Texas' other defense for its lack of review is that "the Constitution permits standardless discretion to impose the death penalty once the defendant has been found eligible for a death sentence."[36] In none of the cases cited by Texas, however, does this Court support the proposition that a state can refuse to provide *any* review of a jury's finding on a sentencing phase issue.[37] And Texas cannot rely on its minimum level of review of the future dangerousness issue,[38] which involves the same kind of subjective determinations as the mitigation special issue. The constitutional import of Texas' refusal to provide any appellate review is that it makes the jury's consideration of the mitigating evidence almost meaningless, especially in light of the confusing supplemental instruction limiting what mitigating evidence the jury can consider.

B. Texas' Capital Sentencing Statute Unconstitutionally Limits the Mitigating Evidence the Jury May Consider

The jury must be able to give *full effect* to all relevant mitigating evidence.[39] Viewed in its best light, the Texas capital sentencing statute is confusing and contradictory. Viewed in practice, it unconstitutionally denies capital defendants the right to have *all* of their relevant mitigating evidence considered by the jury.

The mitigation special issue requires the jury to consider "all the evidence, including the circumstances of the offense, the defendant's character and background, *and* the personal moral culpability of the defendant"[40]

---

formulates these answers in a manner similar to that employed by capital juries in 'pure balancing' States. Thus, the differences between the two systems may be even less than it appears at first examination.").

[36] Opposition, 12.

[37] *Id.*

[38] Opposition, 11.

[39] *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (holding that the sentencer must consider "any relevant mitigating evidence").

[40] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (emphasis added).

when considering whether the mitigating evidence is sufficient to warrant a sentence of life imprisonment. Inexplicably, the supplemental instruction then limits "mitigating evidence" to only that evidence which "a juror might regard as *reducing the defendant's moral blameworthiness.*"[41] By its plain terms, the instruction specifically carves out from the jury's consideration "all the evidence," "the circumstances of the offense," and "the defendant's background and character." Any other reading would render the supplemental instruction in Section 37.071 § 2(f)(4) superfluous.

Perhaps this is not what Texas intended by the instruction, but as demonstrated in the Petition, this is the way the prosecution and the jury understood the instruction in Perry's case. The Petition showed that at least one juror was, in fact, confused by the second special issue.[42] The jurors could have believed that if the mitigating and aggravating factors were of equal weight – *i.e.*, in equipoise – then they were obligated to impose a sentence of death.[43] Some could have believed that the mitigating factors had to be overwhelming in order to be sufficient – there is no way we can know for sure. The prosecutor responded to this expressed confusion by reading the misleading supplemental instruction to the jury. The confused jurors were, at best, still confused, and, at worst, unconstitutionally constrained from considering and giving full effect to *all* of the relevant mitigation evidence presented. A misled jury following the instructions would have certainly foreclosed the opportunity of considering mitigation evidence not related to Perry's "moral responsibility" for the crime. Therefore, there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence."[44]

---

[41] *Id.* § 2(f)(4) (emphasis added).

[42] Reporter's Record Vol. 7, pp. 36-38.

[43] *See State v. Marsh*, 102 P.3d 445 (Kan. 2005), *cert. granted*, May 31, 2005 (holding such a scheme unconstitutional under federal law).

[44] *Boyde v. California*, 494 U.S. 370, 380 (1990).

This Court's recent decision in *Smith v. Texas* reinforces the requirement that a jury be able to give "*full* consideration and *full* effect to mitigating circumstances."[45] Texas cites *Johnson v. Texas* numerous times for the proposition that the jury need not fully consider all of the relevant mitigating evidence so long as it is allowed to give "some" effect to the evidence presented.[46] Texas neglects to mention that this Court has consistently adopted Justice O'Connor's dissent in *Johnson* as the precedent from the case, rather than the majority's opinion.[47] Under the standard articulated in *Smith*, the jury was improperly prohibited from giving full effect to all relevant mitigating circumstances, both due to the statute's limiting instruction, the prosecution's attempted clarification and the jury's confusion.

Texas is fully aware that the mitigation special issue consistently confuses jurors, as the prosecutor understood when he stated that "everyone gets that look [of puzzlement] when they read the second special issue."[48] There is good reason to believe that Texas will not act to remedy this situation until forced to do so by this Court.[49] Perry therefore respectfully requests that the Court emphasize once again the importance of juror certainty in deciding matters of life and death.

CONCLUSION

Petitioner Michael James Perry respectfully prays that this Honorable Court grant a writ of certiorari and review the judgment of the Texas Court of Criminals Appeals.

---

[45] *Smith v. Texas*, 125 S. Ct. 400, 401 (2004) (per curiam) (citing *Penry II*, 532 U.S. at 797) (emphasis in original).

[46] *See, e.g.*, Opposition, 15 (citing *Johnson v. Texas*, 509 U.S. 350, 369 (1993)).

[47] *See, e.g., Penry II*, 532 U.S. at 797 (citing *Johnson*, 509 U.S. at 381).

[48] *See* Reporter's Record Vol. 7, pp. 36-38.

[49] *See Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 125 S. Ct. 400, 401 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Dated: August 22, 2005

Respectfully submitted,

DAVID P. BLANKE
STEVEN R. PARADISE
DAVID R. WOODCOCK, JR.
JESSICA MEDERSON
VINSON & ELKINS L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746
(512) 542-8400
(512) 542-8612 (Fax)

JOHN E. WRIGHT
State Bar No. 22048500
LAW OFFICES OF JOHN E. WRIGHT, P.C.
P. O. Box 6547
Huntsville, Texas 77342-6547
(936) 291-2211
(832) 201-0463 (Fax)

Counsel for Petitioner
Michael James Perry